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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 369.

JAMES G. TINSLEY, Appellant,

vs.

MORGAN TREAT, United States Marshal for the Eastern District of Virginia, et al., Appellee.

BRIEF FOR APPELLANT.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel for Appellant.

In the Supreme Court of the United States.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR EASTERN DISTRICT OF VIRGINIA.

No. 369.

JAMES G. TINSLEY, Appellant,

vs.

MORGAN TREAT, United States Marshal for the Eastern District of Virginia, EDMUND WADDILL, JR., Judge of the District Court of the United States for said District.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

The United States District Attorney for the Eastern District of Virginia filed before His Honor, Edmund Waddill, Jr., Judge of the said District Court, the affidavit of Morgan Treat, Marshal of said District under Sec. 1014 U. S. Rev. Stats., setting up that an indictment had been found in the Circuit Court of the United States for the Middle District of Tennessee on May 25, 1906, styled United States vs. Virginia-Carolina Chemical Company, et al., wherein James G. Tinsley was a defendant, and exhibiting therewith an exemplified copy of said indictment, and averring that the said James G.Tinsley was a resident of the said Eastern District of Virginia, and praying a writ of arrest for him for removal to Tennessee for trial upon said indictment. Judge Waddill, sitting as commissioner under said Section 1014, issued the writ of arrest; the arrest was made, and the defendant, James G. Tinsley, was brought before his Honor, Edmund Waddill, Jr., United States District Judge. Thereupon after reading the copy of the indictment in evidence by the Government, and the admission of said Tinsley of his identity with the person charged, the Government rested, and the defendant, Tinsley, offered himself and others as witnesses to prove that he was a citizen and resident of Virignia, and had

been for many years; that the alleged offenses were never committed in the State of Tennessee; and that he was never any party to any such offense committed in the State of Tennessee; and invoking the protection of Art. III., Sec. 2, Clause 3, and the Sixth Amendment of the Constitution of the United States.

Upon objection by the Government to any witness being sworn, or to any proof being allowed, on the ground that the exemplified copy of the Indictment, with proof of identity, was **conclusive** evidence of probable cause, and of the right to remove defendant for trial under said Sec. 1014, the District Judge sustained the objection, and refused to allow any witness to be sworn, or any proof to be made, and thereupon made the order of removal.

Thereupon application was made by the Government to his Honor, Edmund Waddill, Jr., sitting as District Judge, for a warrant of removal, and the appellant offered to make the same proof by the same witnesses upon that application; but upon objection by the Government for the same reasons, the District Judge refused to permit any witnesses to be sworn, or any proof to be made, and thereupon issued the warrant of removal.

Appellant being thus in custody of the appellee, Morgan Treat, United States Marshal, applied by petition to his Honor, Nathan Goff, Judge of the United States Circuit Court for the Eastern District of Virginia, for writs of **habeas corpus** and **certiorari,** and the writs were duly granted and returned. The petition averred the foregoing recited proceedings before Judge Waddill, and set up that appellant was a citizen and resident of the State of Virginia, and had been such citizen and resident for many years, and that said proceedings denied appellant the protection of said Art. III., Sec. 2, Clause 3, and of said Sixth Amendment, in holding that appellant was bound conclusively by the recitals of the indictment as evidence of the jurisdiction of the Circuit Court of the United States for the Middle District of Tennessee, to try the appellant for the alleged offenses, and of the fact that the alleged offenses were committed in Tennessee by appellant, and in refusing to permit any witnesses to be sworn or any proof to be made that appellant never committed the alleged offenses and was no party to said alleged conspiracy.

The petition avers (R. p. 10) "that the said supposed offenses in said indictment mentioned and charged were not, nor was any or either of them, committed in the said Middle District of Tennessee;

that none of the alleged acts, transactions, matters, or things, which are in said indictment mentioned or referred to as being or constituting the supposed engaging by this defendant in the said alleged conspiracies in the said indictment referred to, or any or either of them, were done or held or took place within the said Middle District of Tennessee, and no alleged act, transaction, matter or thing, in said indictment mentioned, or referred to as being the doing by this defendant or an act to effect the object of said conspiracy was done, held, or took place within the Middle District of Tennessee," and it specifically denies that the specific acts charged to have been done by appellant in Tennessee were committed by him in that State. (R. 10.) It further avers that the said indictment does not charge the commission by your petitioner of any offense against the laws of the United States, and that the same is insufficient and void. (R. 11.)

The return of Morgan Treat, U. S. Marshal, on the writ of **habeas corpus** does not controvert any of the allegations of the petition and merely set up and referred to the proceedings before Judge Waddill, Jr., as his authority for detaining appellant in custody. R. 64.

Upon the hearing of said petition for writs of **habeas corpus** and **certiorari**—the record having been duly certified to the Circuit Court—appellant offered to prove the averments of fact of said petition and exhibits, by witnesses then present, but his honor, Judge Goff, upon objection by the Government, held that said indictment, with proof of identity, was **conclusive evidence** of probable cause, and of the jurisdiction of the Circuit Court of the United States for the Middle District of Tennessee, and refused to permit any witness to be sworn, or any evidence to be adduced by appellant to prove the facts set forth in the petition and exhibits. The prayer of the petition was denied, and appellant was remanded to the custody of the Marshal, and, hence, this appeal.

BRIEF.

This appeal draws in review the following among other questions. Other counsel will further consider these and the other questions involved.

I.

The Indictment, R. 15.

(a) Charges no offense against the United States:

(b) Charges no offense against appellant committed in the Middle District of the State of Tennessee, or elsewhere:

(c) The joinder of the first, second, fourth and fifth counts of the indictment with the third and sixth counts thereof denies to appellants:

(a) The protection of the Fifth Amendment to the Federal Constitution, in that it subjects him, "for the same offense to be twice put in jeopardy of life or limb."

I.

The Indictment Does not Charge Any Offense.

This question is reviewable on this appeal.
Hyde v. Shine, 199 U. S. 62.

1. Counts one, two, four and five are framed expressly under Section One of the Sherman Anti-Trust Act, Sup. Rev. Stats., 1874–1891, 762.

2. Counts three and six are framed expressly under Section 5440, Rev. Stats.

First Count of Indictment, R. 15.

This Count avers an alleged violation of Section One of the Sherman Act.

Time.—It avers that the acts of engaging in the conspiracy were done from July 8, 1903, to September 1, 1905; (R. p. 15) but does **not aver that the conspiracy was being engaged in at the time of the finding of the indictment** in May, 1906.

Parties.—It has fifty-nine distinct defendants, thirty-one of which are corporations; of these, three are alleged to be of New Jersey, two of Illinois, one of North Carolina, three of South Carolina, eight of Georgia, one of Delaware, one of Kentucky, one of Great Britain, one of Florida, two of Mississippi, one of Louisiana, three of Alabama, one of West Virginia, one of Virginia, and two of Tennessee. Three of the defendants are alleged to be partnerships, and twenty-five are individuals, one of whom is appellant, without any averment of residence. There is no averment that any of the corporation defendants have any agents upon whom service of process may be had in Tennessee.

The Count avers that these several corporations and firms "before and on" July 8, 1903, and from then until and on September 1, 1905, (R. p. 15), **"did carry on business in the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Tennessee** hereinafter in this indictment called the states of the conspiracy as wholesale dealers in" fertilizers, which then were useful articles of merchandise, indispensable for use in raising of the crops "in the states of the conspiracy"; and that the individual defendants, (R. p. 16) severally averred **to be officers, or agents, or attorneys of twenty of the defendant corporations,** and several of them averred to be members of said partnerships **"in their several capacities as officers, managers, agents and attorneys of said corporation defendants and members of said firms and on behalf of those corporations and firms,** during the period of time of this indictment first aforesaid, **did carry on the business aforesaid."** (R. p. 16.) Appellant is made one of said individual defendants, to-wit: "James G. Tinsley, President of said Marietta Fertilizer Company," "and Vice President of said Tennessee Chemical Company." (R. p. 16.)

It avers (R. p. 17) that "in **so carrying on said business, trade and commerce,"** the defendant, the Virginia-Carolina Chemical Company, and individual defendants, Morgan, President; Whittle, Vice President; Dancy and Wilcox and Smith, Managers and Agents of Virginia-Carolina Chemical Company, made use of and operated a portion of their **"said business, trade and commerce"** through each of certain other corporations, to-wit: The American Fertilizer Company of Virginia, the Birmingham Fertilizer Company of Alabama, and three other named corporations, two of Georgia, and one of North Carolina, owning the whole or a majority of the stock of these corporations. That defendant corporation, Armour & Company, and Carpenter and McDowell, its Managers and Agents, the said Wilson, its Attorney and Agent, in **so carrying on the "said business, trade and commerce"** made use of and operated through another corporation called the Tuscarora Fertilizer Works. That a number of the other defendant named corporations and firms used other recited trade and corporate names for carrying on **"said business, trade and commerce."**

Place.—The places of business of defendant corporations or firms, or of the other corporations through which the said defendant corporations and firms carried on "said business,

trade and commerce," are not averred. The general averment is that defendant corporations and firms "did carry on business in" the specifically named states called "states of the conspiracy"; there is no averment that each of the defendants did not have places of business and do "business" in each of the said "states of the conspiracy," and have a legal domicile for the service of process upon them in such states.

It is averred that **"in so carrying on the said business** the said defendants x x x **did sell and deliver large quantities** of the said merchandise **within the limits of the states of the conspiracy from the respective places of business of said corporation defendants and the said firms located at different points within these states, to retail dealers and consumers of such merchandise in such states respectively,"** etc.

(1) **The legal effect of the count is to charge the corporation and not the individual with the crime.**

The charge is (R. 18) that "said corporation and individual defendants x x did x x engage in a conspiracy in restraint of the said business, trade and commerce, so then being carried on by them as aforesaid." The said business, trade, and commerce was that of the corporations and firms, and not that of said individuals. The averment is that said individuals carried on said business, trade and commerce for and on behalf of corporations and firms and in a representative capacity and not for themselves individually.

(2) The three specific acts of appellant alleged, after the general averments of the alleged conspiracy, to have been done in pursuance of the conspiracy, and to effect the object of the same, and as an act on his part of engaging in the same, are: (R. 20) First, that Samuel T. Morgan, Fortesque Whittle, Frank D. Dancy, Frank E. Wilcox, J. Rice Smith, Austin B. Carpenter, Charles G. Wilson, Fred C. Brown, Frank Burbidge, William J. McCormack, George Braden, Augustus D. Adair, James D. McCarty, William DeC. Keesler, Isaac Mayo Read, Frank S. Royster, Charles F. Burroughs, A. J. Ives, and T. Porter Fleming, on September 17, 1903, **in the city and state of New York,** "unlawfully did meet together to discuss and further the object of said unlawful conspiracy x x x they x x x when and where they so as aforesaid met together, each well knowing the character and purpose of said meeting, and that his said act was done in pursuance and to effect the object of said conspiracy and was an act on his part of engaging in the

same." Second (R. 28): That, "in pursuance of said unlawful conspiracy, and to effect the object of the same, and as an act on his part engaging in the same" on December 3, 1903, in said middle District of Tennessee, he "as Vice President of said Tennessee Chemical Company, unlawfully did sign his name with official designation, to-wit: 'James G. Tinsley, V. P.' to a certain check drawn by the said Tennessee Chemical Company upon the Bank of America, New York, for the payment of $6792 to the order of the said James G. Tinsley; x x x when and where he did as aforesaid sign his name to the said check, well knowing the contents of the same, and that his said act was done in pursuance and to effect the object of said unlawful conspiracy, and was an act on his part of engaging in the same."

Third (R. 34): That, in pursuance of said unlawful conspiracy and to effect the object of the same, and as an act on their parts, respectively, of engaging in the same, the said Frank Burbidge, appellant and six others, individual defendants x x x "at the city of New York x x x the city of Washington x x x Old Point Comfort and Hot Springs x x x St. Augustine x x x and French Lick Springs x x x unlawfully did, as officers, directors and attorney of the said Colonial Development Company, Limited, meet together **for the purpose** of discussing and attending to the officers of the said Colonial Development Company, Limited; they, the said Frank Burbidge," appellant and others, when and where they so met together as aforesaid well knowing the purpose of such meetings, and well knowing their acts in the premises to be acts in pursuance and to effect the object of the said unlawful conspiracy, and that the same were done as acts on their parts respectively of engaging in the said unlawful conspiracy."

These acts are predicated of a **then existing conspiracy,** not formed by appellant, nor by those who are averred to have met with him, but by the corporation defendants and firms in regard to the "said business, trade and commerce," so carried on by them. That in pursuance of this then existent conspiracy, and to effect the object of the same, and as an act on his part of engaging in the same these acts were done. Being a charge of individually **engaging in a conspiracy already in existence,** the elements of **intent** and **knowledge** must be averred; and this conspiracy must be in restraint of interstate trade and commerce; and as the act averred is the act of engaging in the conspiracy, it must be in restraint of interstate commerce by sales

and delivery of said merchandise, at uniform and non-competitive prices, or shipping said merchandise in interstate commerce under an unlawful agreement so to do.

The second specified act was **official,** and is shown by the averment to be as "Vice President of said Tennessee Chemical Company." The last, as an officer of Colonial Development Company, a corporation not indicted, nor averred to have been a party to the conspiracy, nor engaged in interstate commerce.

The first act averred, the alleged unlawful conference in in New York, is controlled by the averments theretofore recited that the acts of the said individual defendants, including appellant, were in their several capacities as officers, agents, etc., in carrying on the business of the defendant corporations and firms on behalf thereof, and for said corporations and firms.

The acts averred, being **official** acts, the indictment does not charge any **individual** criminal intent. If this indictment were a declaration at law it would aver a corporate and not an individual liability of appellant. The gravamen being the unlawful restraint of trade, and the corporation defendants, and not the individuals,, being averred to be carrying on said business, trade and commerce, the criminal act and the criminal intent would be that of the corporation, and not that of **both** the corporations and their officers and agents. The Colonial Development Company is not indicted; nor is it averred to have been engaged in carrying on "said business, trade and commerce."

The statute does not provide that "every person" **and** corporation; nor every corporation, **its officers and agents,** who shall engage in, etc., but only in the **singular,** and specifically and severally.

In the absence of authority, or of a ratification of the agent's acts, a corporation could not be held civilly or criminally liable for the wilful, criminal acts of its agents, **New Orleans & North Eastern Railroad Co. v. Jopes,** 142 U. S. 27; **Lake Shore Ry. Co. v. Prentiss,** 147 U. S. 101–107–115; **Washington Gas Co. v. Lansden,** 172 U. S. 534–5–6; **U. S. v. Birch,** 1 Cranch C. C. 571; **U. S. v. Beatty,** Hemps. 482; **Somerset v. Hart,** 12 Q. B. Div. 360; **1 Clark & M. Private Corp.,** Sec. 249.

A corporation can only act through its agents; and, hence, if the criminal act done is that of the corporation, the same act cannot be, also, that of the individual. The act of the agent is essential to the creation of the offense by the corporation,

and the intent of the act, done in his representative capacity, is the intent of the corporation and not that of the individual. **1 Clark & M. Private Corp.** Sec. 238 (a), (b), (c); **Phil. & R. Co. v. Quigley,** 21 How. 202; **U. S. Deitrich,** (C. C.) 126 Fed. 664; **Chadwick v. U. S.,** 141 Fed. (C. C.) 236; **Speed v. Bank,** 22 Conn. 530; **Maynard v. Firemans Fund Ins. Co.,** 91 Am. Dec., 672; **So. Ex. Co. v. Platten,** 93 Fed. 936.

The criminal intent to conspire cannot be the common act and common intent of both a corporation and of the agent; for, if it is the criminal act and intent of the agent personally, it would not be the act of the corporation. **N. O. etc., R. R. Co. v. Jopes,** 142 U. S. 27, **supra; Latham v. R. R. Co.,** 72 Miss., 32; **Canton Co. v. Pool,** 78 Miss., 156; **Ritchie v. Waller,** 27 L. R. A. (Conn.) 161; **Rounds v. Railroad,** 64 N. Y., 136; **Com. v. Nichols,** 10 Met. 249.

Corporations are liable to indictment even where crime involves malice and evil intent. **1 Clark & M. Priv. Corp.,** Sec. 249; **State v. Passaic Co.,** 54 N. J. L. 200; **Tel. Newspaper Co. v. Com.,** 172 Mass. 274.

This separate responsibility of "every" corporation which engages in a conspiracy in restraint of trade is emphasized by Section 8 of the act, which declares that the word "person" or "persons" "wherever used in the act shall be deemed to include corporations and associations existing," etc. The gravamen being the restraint of trade, the acts of the corporation in trade, and not that of the persons composing or acting as agents for the corporation, are condemned. Stockholders of a corporation would not be indictable for the act of the corporation in engaging in a conspiracy in restraint of trade, and, yet, they, and not its officers or agents, are the real beneficiaries of the criminal act. There is no suggestion in the act for the criminal responsibility of **both** the corporation and the individual officers or agents of the corporation **for the same act.** Section 8 by using the language of substitution of "corporation" for "person" would make paragraph 2 of Section 1 read: "Every corporation who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty," etc.

(2) **The legal effect of the count is that there is no conspiracy in restraint of interstate commerce, nor of engaging therein averred.**

The averment is (R. p. 15) that the several corporations and firms **"did carry on business** in the states of North Carolina,"

etc. x x x "as wholesale dealers" in fertilizers, and that this "business" was carried on by the several officers, managers, etc., **on behalf of the corporations and firms;** "that in **so carrying on said business** the said defendants, that is to say, the said corporation and individual defendants" (not firms, although these firms are elsewhere throughout the indictment sought to be charged) (R. p. 16) "**did sell and deliver large quantities** of said merchandise **within the limits of the states of the conspiracy from the respective places of business of the said corporation defendants and the said firms, located at different points within these states, to retail dealers in and consumers of such merchandise, in such states respectively, and did also ship** large quantities of the same **from their respective places of business, located in the said states of the conspiracy; and also in the states of Virginia, Illinois, and Kentucky into and through other of the said states than those in which their said place of business were located;** and in **so carrying on said business and shipping** the said merchandise from one of said states into and through another or others thereof, the said defendants, during the period aforesaid, were **engaged in trade and commerce among the states of this Union within the meaning of the Act of Congress,** approved July 2d, 1890."

Analyzing this charge it is, that defendants "did carry on **business,"** and in so doing they **"did sell and deliver** large quantities **of said merchandise within the limits of the said states of the conspiracy from the respective places of business** x x x **located at different points within these states, to retail dealers in and consumers of such merchandise, in such states respectively."**

The specific averment as to carrying on "said business" is that of **selling** and **delivering** from their respective places of business **within the states** of the conspiracy "to retail dealers in and consumers" "**in such states respectively."** This avers **intra-state** and not interstate "business."

The word "business" has a broader signification than "trade". **Harris v. Amory,** L. R. 1. C. P., 154; **In Re Ala. R. Co.,** 9 Blatch 390; **Doe v. Bird,** 29 E. C. L., 57; **Doe v. Keeling,** 1 M. & S. 100; **Adams v. Boston R. Co.,** 1 Holmes (U. S.) 35.

The expression "did carry on business," as defined by these averments, is that of selling and delivering from its places of

business to retail dealers and consumers within these states.

The count continues by averring another and additional transaction, viz., **"and did also ship** large quantities of the same from their respective places of business located in the said states of the conspiracy; and also in the states of Virginia, Illinois and Kentucky, into and through other of the said states than those in which said places of business were located; and that in so carrying on said business and shipping the said merchandise from one of said states into and through another or others thereof, the said defendants x x x were engaged in trade and commerce among the states."

The selling and delivering **intra-state,** was the carrying on the "said business," and to this is added by the language **"and did also ship"** the additional and further averment, independent of the selling and delivering intra-state, viz.: Shipping in intra and interstate commerce. By the word **"also"** is meant "in like manner," "further," "in addition to," "too." **2 Am. & Eng. Enc. of Law,** 2d Ed. 177. This word **"also"** implies something in addition to what has gone before. **McCurdy v. Alpha Mining Co.,** 3 Nev. 37; **Dalton v. Bowker,** 8 Nev. 191; **Panton v. Teft,** 22 Ill., 367.

The word **"ship"** does not mean **to sell,** but to deliver to a carrier for transportation. **Webster's Dictionary; 25 Am. & Eng. Enc. Law,** 2d Ed. 851. It—ship—as the vehicle, is used by synecdoche for the act of transportation. To "ship large quantities of the same" does not convey the idea of **selling,** but only that the merchandise was delivered to a carrier for transportation from one point to another. The quoted paragraph separates the carrying on of the "said business **and** shipping" the said merchandise, and makes these acts separate one from the other, and charges that in so carrying on **"said business"** (selling and delivering intra-state) **"and"** "shipping," the defendants "were" (as a conclusion) "engaged in trade and commerce among the states." This distinction between carrying on the "said business" (selling and delivering), and that of "shipping" is preserved throughout the whole count, and uniformly, the words "said business, trade and commerce" are, conjunctively and without differentiation, used. This clearly appears in the averments (R. p. 18) that of the "**total volume of such business, trade and commerce,** then so being carried on by said defendants and their competitors, the said defendants together had controlled the principal part—that is to say, ninety

per cent. thereof"—thus, without differentiation between such "business," that is, selling and delivering intra-state, and shipping **intra** and **inter** state, in trade and commerce, the charge is made that, in the aggregate, the defendants—severally not by agreement—controlled the principal part. This appears (R. p. 18) further from, "and that because the said corporation defendants and the said firms were in fact separate and distinct from each other they should have conducted **their inter-state trade and commerce** strictly in competition with each other," omitting therefrom the word "business" when the **"inter-state trade and commerce"** is spoken of; and thus by this expression **"inter-state trade and commerce"** in contra-distinction to "said business, trade and commerce" the different ideas of "shipping" and "business" are expressed.

It is to be noted that the averment, supra, as to the amount of business controlled does not claim that there was a monopoly, or even an attempt to monopolize the trade.

And further (R. p. 18) and "then would have so conducted same" (inter-state trade and commerce) "but for the unlawful conspiracy in restraint of said business, trade and commerce in this indictment mentioned."

The preservation of the distinction between the carrying on of "said business" intra-state, and the "shipping" in intra and interstate commerce is necessary in the construction of this indictment, because the gist of the act charged, as being in restraint of "said business, trade and commerce" is the alleged making of "uniform and non-competitive prices," which can only apply to sales and not to shipping. Even though "intra-state" commerce be included in the unlawful conspiracy in restraint of trade among the states, it constitutes no violation of the Sherman Act. **U. S. v. Addystone Pipe Co.**, 85 Fed. supra; **U. S. v. E. C. Knight Co.**, 156 U. S., 1.

The indictment further charges as the gist of the conspiracy (R. p. 18) that "the said corporation and individual defendants" (not firms), "during the period aforesaid, at and within the said Middle District of Tennessee, in violation of the **provisions of said Section 1,** of said Act of Congress, **unlawfully did knowingly engage in a conspiracy in restraint of"** not trade or commerce among the states, but of **"the said business"** (intra-state) **"trade and commerce"** (intra and inter-state) **"so** then **being carried** on by them **in the manner aforesaid, whereby** the **said business, trade and commerce** was restrained **in the several ways**

and by the several means now here set forth and described—that is to say."

These averments do not charge an offense under section One of the Sherman Act.

(1) They do not, by proper words, aver: (a) Either the existence of a conspiracy; or (b) the engaging in a conspiracy; (c) it avers that the engaging in the conpsiracy was in the past and not that it was then being engaged in.

"In an indictment, nothing material shall be taken by intendment or implication. **Hawkins Pl. Cr. B.,** 2 Ch. 25. Sec. 60.

(a) (1) The statute does not define what a "conspiracy" is; nor does it define the offense of engaging in a conspiracy, so as to make a charge in the words of the statute sufficient, Where, as here, the offense at common law was not indictable, but is made so by statute, the statute must be strictly pursued. **1 Whar. Am. Cr. L.,** Sec. 371; **Com. v. Howie,** 15 Pick. 231.

"It may be necessary to describe the unlawful act where it has a specific name which indicates its criminality, yet, when the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features, and without being so, it cannot be shown that the confederates had an unlawful purpose." **Com. v. Barr,** 5 Barr (Pa.) 60; and see **Com. v. Eastman,** 1 Cush. (Mass.) 190; **State v. Mayberry,** 48 Me. 219; **State v. Parker,** 44 N. H. 83; **Lambert v. People,** 9 (Cow. N. Y.) 578; **Alderman v. People** 4 Mich., 414; **State v. Jones,** 13 Ia., 269. The conclusion **contra forma statuti** will not cure. **2 Hale Pl. Cr.,** 170; **1 Whar. Cr. L.,** Sec. 239.

An indictment for conspiracy which does not directly aver facts sufficient to constitute the offense, is not aided by matters which precede or follow the direct averments; nor by qualifying epithets as "unlawful," "deceitful," "pernicious," etc. **U. S. v. Goldberg,** 7 Biss., 175; **Re. v. Hewey,** 2 East P.C. 858; **State v. Norton,** 2 Zabr. 23; **U. S. v. Britton,** 108 U. S. 199.

The word "conspiracy" does not necessarily signify a criminal offense. **Philbroke v. Newman,** 85 Fed. 140; **Bitzer v. Washburn,** 121 Ia., 466; **McHenry v. Feran,** 56 Ia., 652.

Where the statute refers to a common law offense by its popular name, and imposes a penalty for its commission, it is insufficient to charge the offense in the statutory terms. **Com. v. Odlin,** 23 Pick, 275; **Sullivan v. State,** 67 Miss., 349, 0, 1; **State**

v. Abena, 3 Port. 397; **State v. Stedman,** 7 Id. 495; **U. S. v. Scott,** 4 Biss., 29; **U. S. v. Simmons,** 96 U. S. 360.

(2) If the words of the statute sufficed, no such language as "did knowingly engage in a conspiracy in restraint of the said business, trade and commerce" can be found therein; especially, where "said business, trade and commerce" had, by previous definition, been defined as embracing other than interstate commerce. The indictment proposes to recite the statute and any material variance is fatal. **1 Whar. Am. Cr. L.** Sec. 365; **Butler v. State,** 3 McCord 389.

(3) "Conspiracy is the corrupt" (**Ward v. State,** 47 N. J. L. 468) "agreeing together of two or more persons to do, by concerted action, something unlawful either as a means or an end." "Corrupt" "denotes an evil purpose." "Unlawful signifies x x contrary to any law, civil or criminal." "Agreeing together constitutes the sufficient act of wrong, no steps pursuant to the agreement being required." **1 Bishop New Cr. L.,** Sec. 171,2.

(4) "Unlawfully did knowingly engage in a conspiracy in restraint of said business, trade and commerce," is insufficient as an allegation of conspiracy, or of engaging in a conspiracy.

(a) It does not aver that the conspiracy was "corrupt"; (b) It does not aver that he had knowledge of the designs of the conspirators and intentionally participated in their scheme. **6 Am. & Eng. Enc. L.,** 2d Ed., 840, note. There must be an intentional participation in the transaction with the view to further the common design, and it must appear that defendant, with knowledge of the nature of the conspiracy, "knowingly and designedly assented to and united in the unlawful combination charged." **U. S. v. Goldberg,** 7 Biss., 175 supra.

(5) To aver conspiracy, it must aver that two or more **corruptly** combined and conspired together to do the act. **Ward v. State,** 47 N. J. L. 468, **supra.** The unlawful agreement is the gist of the offense of conspiracy. **Hyde v. Shine,** 199 U. S. 76, 77; **People v. Mather,** 4 Wend. N. Y., 220. Even under section 5440, Rev. Stat., the conspiracy is the offense and the overt act is no part thereof. **U. S. v. Britton,** 108 U. S., 192, 204. "It remains true that the combination of minds in an unlawful purpose is the foundation of the offense, and

that a party who did not join in the previous conspiracy, cannot under this section" (5440) "be convicted on the overt act." **U. S. v. Hirsch,** 100 U. S., 33,34; **Dealy v. U. S.,** 152 U. S. 546; **Bannon v. U. S.,** 156 U. S. 464.

It is not averred that there was any corrupt, or other agreement, between defendants to do what was done in the formation of the conspiracy; or, in fixing prices; or, in making the payments to the Colonial Development Company; or for allotment of material; or, in the terms of sale; or, in making use of the Colonial Development Company. It is averred that defendants did these **several** acts, but there is **no averment** that they were done by defendants, **by agreement,** much less corruptly combining and conspiring together to do them.

(6) The averment that said corporation and individual defendants "unlawfully did knowingly engage in a conspiracy in restraint of said business, trade and commerce x x x whereby the said business, trade and commerce was restrained in the several ways and by the several means now herein set forth," neither sufficiently sets forth a conspiracy in restraint of trade or commerce among the states, nor that the defendants engaged in such conspiracy.

The allegation purporting to be in restraint of trade is (R. p. 18) that competition as to prices at which "said merchandise" was "sold and delivered" "was prevented and destroyed by said defendants fixing and causing to be fixed, uniform and non-competitive prices, by them styled "current, reasonable, market prices," for the said merchandise so sold and delivered x x in those states, and the selling and delivering, and causing the sale and delivery of such merchandise in the said business, trade and commerce, at the prices so fixed and caused to be fixed."

This is insufficient: (a) No **agreement** as to prices is averred; (b) "Causing to be fixed" does not mean fixing by direct action. **Words and Phrases. Tit.** "Causing;" (c) Prices were applicable and confined to "merchandise" "sold and delivered" in **said "business, trade and commerce,"** and this was **intra-state** commerce. The specific averment of sale and delivery in said "business, trade and commerce," without any reference whatever to **shipments** among the states, or to any connection between shipments and said "uniform and non-competitive prices," excludes from consideration the aspect of "said business, trade and commerce" pertaining to shipments in interstate commerce.

To make this more emphatic the averment is "in restraint of the **said business, trade and commerce,** so then being carried on by them in the manner aforesaid," and which, as stated, **supra,** was in selling and delivering in intra-state commerce, and in shipping in intra and inter state commerce.

"Engaging in a conspiracy in restraint of trade" is not defined; nor is its effect as a restraint alleged, except that it is averred "**whereby** the said business, trade and commerce was restrained in the several ways and by the several means now here set forth and described that is to say." This is a mere conclusion, and not the averment of a fact. The several ways and means are not averred as restraining trade and commerce among the states, but are predicated of the alleged restraint of "said business, trade and commerce"; and none of these, either by its nature or by averment, has application to inter-state trade and commerce: on the contrary they apply only to the said intra-state business of sale and delivery of fertilizers.

The count (R. p. 18) avers that the several "ways" and "several means" by which "said business, trade and commerce" was restrained was **"competition as to prices** at which said merchandise **was sold and delivered** by the said corporation defendants and the said firms **in the said states** of the conspiracy which before x x x had existed between the said corporation defendants and the said firms respectively **in said business, trade and commerce,** and which as aforesaid should have continued to exist during the said period, was prevented and destroyed **by the said defendants** from time to time fixing, and causing to be fixed, uniform and non-competitive prices, by them styled "current, reasonable market prices," for the said merchandise so **sold and delivered** by the said corporation defendants and the said firms **in those states,** and selling and delivering, causing the sale and delivery of such merchandise **in said business, trade and commerce,** at the prices so fixed and caused to be fixed, which said uniform and non-competitive prices were prices greatly in excess of the prices which but for the said unlawful conspiracy would at such times have prevailed for the said merchandise in **said business, trade and commerce,** and were prices **therefore** unreasonable and were a tax on the people of the states of the said conspiracy amounting to a large sum of money, to-wit, Four Million Dollars, annually during the continuance of the same."

This allegation is insufficient: (a) The competition averred

was **in the prices** of merchandise **sold and delivered in the states of the conspiracy,** which as shown, **supra,** was intra-state commerce; (b) There is no averment that the prices were fixed, or caused to be fixed, **by any agreement of the defendants;** nor, that they were unlawfully fixed; nor that they were fixed by the defendants, corruptly combining and conspiring together. **Ward v. State,** 47 N. J. L. 461; **supra; 1 Bishop N. Cr. L.,** Secs. 171,2, **supra;** (c) There is no averment that there was any restraint in **shipping** the merchandise, nor that any merchandise was, in fact, shipped; and as shown, this shipping is the only act, which could be said to be an act having any relation to interstate commerce, averred in the count. (d) There is no averment that the alleged prices were required to be kept and enforced under any penalty whatever;

(e) The averment that "said uniform and non-competitive prices" were greatly in excess of the prices which but for said unlawful conspiracy would at such times have prevailed for the said merchandise in said trade and commerce is insufficient, because: (a) What prices had prevailed—at times in the past—is too indefinite and remote; and whether current market prices or not is not averred: and what prices "would have prevailed" is not the averment of the fact of an actual restraint of interstate commerce; (b) Prices have no relation to shipments of merchandise; (c) The averment that they are greater than "would have prevailed" is a conclusion and not the averment of a fact; (d) And were prices **"therefore** unreasonable" is a conclusion and not the averment of a fact; (e) There is no averment as to wherein the said alleged uniform and competitive prices were unreasonable; (f) It is not shown how said prices could be a tax, nor wherein the alleged, to-wit, Four Million Dollars, consisted; (g) There is no averment that these defendants had a monopoly of, or that they monopolized the trade in interstate commerce. In the absence of a monopoly, it is not perceived how prices fixed by one or more dealers in commercial fertilizers, unless the trade conditions sustained them as reasonable, could be in restraint of commerce, and especially not, where, as here, it is not averred that these prices were fixed by agreement.

This count (R. p. 18) further avers that "for and on account of such quantity of said merchandise so **sold and delivered,** as aforesaid," (intra-state business) "by any of such corporation defendants or of such firms in excess of amounts allotted and caused to be allotted to them respectively by said defendants,

the sum of one dollar and fifty cents for each ton of ammoniated fertilizers and one dollar for each ton of other fertilizers so sold and delivered in excess"(intra-state business)"was by the corporation defendants and firms so selling and delivering the same, paid into a common fund, held by the Colonial Development Company, Limited, hereinafter mentioned."

This is insufficient: (a) There is no averment of **any agreement,** corrupt, unlawful or otherwise, between the defendants to pay said sums; nor, for any allotment; nor by whom such alleged allotments were to be made, whether by the corporations, or firms or individuals, or by them or any of them, jointly or separately; (b) There is no averment of any joint, unlawful act charged; (c) The Colonial Development Company, Limited, is averred to be "a corporation organized under the laws of the Province of Ontario in the Dominion of Canada, and is not averred to have been organized by the defendants, nor to have been other than a lawfully organized existing and lawful corporation, acting within the scope of its charter powers and as a corporate body; (d) Such payments pertained only to intra-state business, and no connection with interstate business is averred.

It is further averred (R. p. 19) that from "which said fund" (one dollar and fifty cents and one dollar excess) "the said **Colonial Development Company, Limited," compensated** at the same rates per ton ammoniated and other fertilizers **such of said corporation defendants and firms as sold and delivered"** (intra-state business) "less than the amount so allotted to them respectively so it was not less than **seventy-five per centum** through and during the first year of the continuance of the said unlawful conspiracy and **ninety per centum** through and during the second year."

This is insufficient: (a) It is not averred that the Colonial Development Company was to make these payments **as compensation under any agreement,** unlawful or otherwise, by the defendants; and the payments were confined to the excess of allotments of fertilizers **"so sold and delivered in excess"** and which was, as shown, entirely intra-state business.

The count further (R. p. 19) avers "it being" (not an averment of fact; 57 Fed. 382; **Id.** 591, and 115 N. Y. 496) "a further element of the said unlawful conspiracy that each" (several act) "of the said corporation defendants and of the said firms also" (in addition to) "paid into the said fund" (to the Colonial

Development Company) "the sum of twenty cents for and in respect of each ton of **such merchandise** going to make up this said allotment, to be the **absolute property of the said Colonial Development Company, Limited, unless such corporation defendant or firm, in disposing of** its said allotment in **carrying on the said business, trade and commerce,** on its part faithfully should exercise every reasonable effort and due business diligence to maintain the prices so fixed and caused to be fixed **as aforesaid** (for sales and deliveries in intra-state business) "and pay into the said fund the sums accruing to the same on account of its said excess sales," (in intra-state business) "in which case an equal amount was returned to the corporation defendant or firm so paying it into the said fund."

This is insufficient: (a) It is not averred that the said twenty cents **per ton** was to be **paid under any agreement** of the defendants; but the payment is averred to be the **several act** of each party to the Colonial Development Company, a third party, not averred to be a conspirator, or engaged in the conspiracy; and the **said sum** is to be the **absolute property of the Colonial Development Company,** unless **each** corporation or firm defendant, for itself, irrespective of the others, **fails** to comply **with the condition** upon which said twenty cents is paid.

The averment (R. p. 19) further is that "unless each of said corporation defendants and firms **in disposing** of its said allotment in carrying on the said business, trade and commerce."

"Dispose of" means more than to sell. **Phelps v. Harris,** 101 U. S. 380; **Hill v. Sumner,** 132 U. S. 123. It means "to part with" "passing from one's control." **Gould v. Head,** 41 Fed. 245. It does not mean **to ship in interstate commerce,** but merely to part with the ownership of; hence, it is not properly included in the difinition of the act of shipping in interstate commerce. If such had been the equivalent, it should have been averred to have been such act done in interstate commerce. The averment of "disposing of" its allotment, does not mean to sell and deliver at uniform and non-competitive prices, but has relation alone to the amount of merchandise such party has parted with the ownership of by any mode or manner whatever.

The count (R. p. 19) further avers "that the terms of sale of said merchandise by the several corporation defendants and said firms as to times of payment and discounts were also made uniform and non-competitive as between all of said corporation

defendants and the said firms in said business, trade and commerce, among the states of the conspiracy."

This is insufficient: (a) It is not averred that these terms of sale were fixed **by agreement;** (b) They are expressly alleged to have been made uniform and non-competitive "by the said **several** corporation defendants and the said firms"; (c) "Terms of sale" could only apply to goods sold and delivered, and these, under this count, include alone intra-state commerce; (d) "Terms of sale" bear no relation to shipment.

The count (R. p. 19) further avers "as a convenient intermediary and common agent between the said corporation defendants and the said firms, respectively and as a means of securing their co-operation in carrying out the said unlawful conspiracy, the **said defendants made use of** the Colonial Development Company, Limited, a corporation organized under the laws of the Province of Ontario in the Dominion of Canada; that is to say, the shares of the capital stock of Colonial Development Company, Limited, were apportioned among the said corporation defendants, and the said firms approximately upon the basis of their said allotments, and **such shares were sold to them by the said Colonial Development Company, Limited at the rate of ten dollars per share, and the monies accruing from such sale were held and used by the said Colonial Development Company, Limited, so as to further the objects of said unlawful conspiracy, and the said** Colonial Development Company, Limited, was also allowed and required to collect, hold, use and distribute the said fund arising from payments on account of excess sales and other payments of twenty cents per ton as aforesaid."

This is insufficient: (a) It does not charge any restraint of interstate commerce; nor does it pertain to trade and commerce; (b) It does not charge that the Colonial Development Company was **by agreement** among the defendants made agent; it avers that the defendants made use of the company as a convenient intermediary and common agent, and as a means of securing their co-operation, but it does not aver that this use was made **by agreement,** corrupt or otherwise, among the defendants; a common agent may be, and by intendment is, unless the contrary was averred, created by the several acts of each person acting for himself, irrespective of the others. There is no averment that this common agent was **with knowledge and by design** made use of to further the objects of any conspiracy;

(c) The conclusion "and a convenient intermediary and common agent", and its use "as a means of securing co-operation," is defined by "that is to say, the shares of the capital stock of the said Colonial Development Company, Limited, were apportioned among the said corporation defendants, and the said firms approximately upon the basis of said allotments, and such shares were sold to them by the said Colonial Development Company, Limited, at the rate of ten dollars per share, and the moneys accruing from such sale were held and used by the said Colonial Development Company, Limited, so as to further the object of the said unlawful conspiracy."

This is insufficient: (a) There is no averment that all of the shares of stock of this Company were apportioned among the corporation defendants and firms; (b) Nor that any was apportioned **by agreement inter se;** but the distinct averment is that such shares were sold to said corporations and firms by the Colonial Development Company at ten dollars a share. Thus, the capital stock of the Colonial Development Company, or such shares thereof as were sold to these defendants, was sold by the Company, and the money arising therefrom was the money of the Company, as a corporation, and not that of the defendants, who were therefore, mere share-holders in the Development Company; (c) It is not averred that such sale of such shares was unlawful; or, that the sales were not the separate act of the Colonial Development Company in dealing, by its own separate officers, separately, with each defendant; or, that said shares, and their ownership, were in any way connected with any restraint of interstate commerce; or, that the defendants knowingly and designedly, and corruptly combined and confederated together and between themselves, by the creation or use, or agency, of said Company to do any act in restraint of interstate commerce; (d) There is no averment that appellant purchased, or was the owner of, or was in any way interested in the Colonial Development Company, or in its stock.

The averment that "the moneys accruing from such sales were held and used by the said Colonial Development Company, Limited, so as to further the object of said unlawful conspiracy, is an averment of a conclusion, and not of the facts. It is not averred that such was done by the Development Company **by agreement** of the defendants; nor, that defendants, and especially, not appellant, had any knowledge of, or participation

in such use by the corporation of the proceeds of sale of its stock for any such purpose.

The averment that the said Colonial Development Company, Limited, was, "also allowed and required to collect, hold, use and distribute the said funds arising from payments on account of excess sales and other payments of twenty cents **per ton** as aforesaid," is insufficient: (a) It is not shown **by whom** it was allowed and required to so do; (b) Nor that the same was done under **any agreement,** unlawful or otherwise, of these defendants. (c) The fund arising from payments on account of **excess sales** arose from **intra-state commerce,** and that from the payment of the twenty cents per ton was to be the "absolute property" of the Company, if the several parties severally and separately, each acting for himself, did not comply with the condition upon which such payment was to be made by said Company. This was not averred to be a joint agreement of defendants, and especially, is no connection with it by appellant averred.

These are the averments of the first count of the indictment which undertake to set up the charge of a conspiracy in restraint of trade, and as constituting the offense, and which by subsequent averments, each of the defendants, by a separate specific act, is charged to have engaged in.

There is no averment in this count, or in the indictment, that the conspiracy was existent at the time of the finding of the indictment, nor that any act of any party was an act of engaging in a conspiracy existent at the finding of the indictment. Under the rule in **Peoria Gas Co. v. Peoria,** 200 U. S. 48, that "the punishment adheres to the offense and stops when the offense stops," and **Re. Franklin Tel. Co.,** 119 Mass., 447, it would be necessary to aver that the appellant was at the finding of the indictment engaged in the conspiracy.

It will be noted that each and every of the allegations of the indictment relied on as constituting the conspiracy have been acts done by the corporation defendants and firms, and no individual act of this defendant, or of any other individual is averred to have been done in the formation of the conspiracy, or to have heen done otherwise than in the matter of carrying on the business of the corporation for and on behalf of the corporation or firms.

Under paragraph one of Section one, of the Act, up to this

point, in the count, the pleader endeavors to aver a conspiracy in restraint of trade and commerce, and by the said several ways and means set forth. These allegations, as shown, do not charge in proper form, any conspiracy in restraint of trade and commerce among the states. The pleader, however, takes it for granted that this count of the indictment has duly charged the conspiracy, and he then proceeds in conformity to the second paragraph of Section one to aver that each of defendants, by specific act, engaged in it, and by separate paragraphs, some alleged specific act of each person or corporation defendant, as the ways and means, is alleged, was done "in pursuance of the said unlawful conspiracy, and to effect the object of the same **and as an act on its part of engaging in the same."**

SPECIFICATIONS OF ACTS OF ENGAGING IN THE CONSPIRACY.

The averment of each of these alleged acts specific is insufficient.

Each defendant is charged to have done an act, prior to September 1, 1905, "in pursuance of said alleged conspiracy and to effect the object of the same and as an act on its (his) part of engaging in the same. That is **each had engaged in the conspiracy after it was formed.**

These specific acts are the "several ways" and "means" by which these several defendants did each "engage in" such conspiracy. The general precedent allegations as to what defendants, generally, did is controlled by these specific acts, which are averred to be the several acts of each, whereby each committed the offense of engaging in the conspiracy. If a party pleading uses a generic term, comprising, therefore, many species or particulars, and afterward uses an averment, defining what particular or species of the number be insisted on, he is tied up to that particular one. **Stukely v. Butler.** Hob. 172; **Dakins Case,** 3 Saunders 290. note a; 3 Term Rep. 307; 2 **M. & B.,** 279; Com. Dig. Pleader, C 22; **Bishops Cr. Pro. 406; Sullivan v. State,** 67 Miss., 353, 4, 5.

Such specific act is averred to be the commission of the crime, and each act, as to each person or corporation, must be shown by averment to be, in itself, such an act, done, with criminal intent, with knowledge of the nature of the conspiracy, and to become a party to its execution. **U. S. v. Goldberg,** 7 Biss., 175; **supra,** and, as would, if in a separate indictment against each severally,charge, by proper words, guilt of the offense,

"The verdict of a jury does nothing more than verify the facts charged; and if these do not show the party guilty, he cannot be considered as having violated the statute." Shaw. C. J., in **Cone v. Odlin,** 23 Pink, 275.

To avoid undue prolixity, each of these several specifications may be summarized thus:

(a) It does not aver that the defendant charged thereby was any party to the original agreement of conspiracy; nor that the conspiracy was then existent;

(b) No unlawful conspiracy had been averred;

(c) No knowledge of the nature of the conspiracy is averred when such party did the acts of engaging in it; nor is there any averment that with knowledge of the conspiracy, and of its purpose such defendant intentionally and designedly assented to and united in the unlawful conspiracy charged. **U. S. v. Goldberg,** 7 Biss., 175. The averment of "well knowing that the same was in pursuance," etc., in Specifications (R. pp. 20, 21, 23, 25, 27, 28, 29, 30, 31, 32, 34 and 35), is merely a conclusion, and is not an averment that such party had knowledge of the nature of the conspiracy, and with such knowledge designedly assented to and united in it.

(d) The Specifications on R. pp. 19, 20, 21, 23, 24, 25, 26, 27 aver separate, past acts of "engaging in" outside of Tennessee. **Reg. v. Boutton,** 12 Cox. 88; **U. S. v. Newton,** 52 U. S., 275; **U. S. v. Britton,** 108 U. S., 205; **Hyde v. Shine,** 199 U. S., 62. And those averred to have been done inside of Tennessee were not acts done in interstate commerce.

(e) The acts averred do not constitute acts done in interstate commerce, and especially, not in restraint of interstate commerce.

(f) The acts done are not averred to have had any connection with a sale and delivery of fertilizers; nor with any such sale at uniform and non-competitive prices; nor with any shipment in interstate commerce; nor with any competition in prices, or sales, for such shipment in interstate commerce, The only specification which refers to prices is the second paragraph on page 21, and this as shown, **infra,** is insufficient.

(g) There is no averment that any of the said acts purporting to have been done by said corporations in engaging

in said conspiracy were authorized by the said corporations to be done for it. There is no presumption from the act itself of authority of a corporation for engaging in crime. There is no averment that any of said officers, acting for said corporations, had any authority from it to commit this crime for it.

(h) The authority of the alleged **agents** to do the alleged acts is not averred; and without such averment of authority the principal is not bound for his criminal act.

(i) A single act, and especially one which did not show on its face an unreasonable restraint on interstate commerce, could not constitute the act of engaging in the carrying out of a conspiracy in restraint of interstate trade.

(j) These several acts specified against the several persons could not properly be joined as counts in an indictment; nor could each of the offenses charged be tried, under the Constitution, at other place than the State and District where it was committed.

(k) There is no averment that the conspiracy which had been formed, and in which said several defendants had engaged by the several acts averred, was in existence at the time of finding of the indictment, but it clearly appears to the contrary.

The only specification (R. 21) referring even remotely to the matter of prices is that in pursuance of said unlawful conspiracy and to effect the object of the same, and as an act on his part in engaging in the same, "the said Frank E. Wilcox x x x at and within the City of Norfolk x x x unlawfully did deliver to one W. W. Perkins, Secretary of the said American Fertilizer Company, a certain document, too voluminous to be here set forth, stating certain prices and terms of sale, fixed in pursuance of the said unlawful conspiracy, for the said fertilizer merchandise, in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, and Tennessee, for the spring season of the year nineteen hundred and four; he, the said Frank E. Wilcox, at the time and place when and where he so aforesaid delivered the said document to the said W. W. Perkins, well knowing the character of the same, and that his said act was done in pursuance and to effect the object of the said unlawful conspiracy as aforesaid, and was an act on his part of engaging in the same."

This is insufficient:

(a) The act was an official act of Wilcox, averred to have been manager and agent of the Virginia-Carolina Chemical Company, dealing with the Secretary of one of its subsidiary companies, the American Fertilizer Company (R. 17); (b) The alleged act was outside of Tennessee; (c) The alleged delivery of the document, stating certain prices and terms of sale, fixed in pursuance of the said unlawful conspiracy, for said fertlizer in the states of North Carolina, South Carolina, Georgia, Florida, Alabama and Tennessee, shows:

(a) The delivery of a list of prices between the principal and agent; (b) It does not aver that the prices were fixed by agreement with defendants; nor by whom they were fixed; (c) The prices were for fertilizer in North Carolina, South Carolina, Georgia, Florida, Alabama and Tennessee, without averment that there was any sale or delivery, or shipment in interstate commerce; (d) The prices averred as being fixed in the states named are not the prices alleged to have been fixed in the states of the conspiracy, namely, North Carolina, South Carolina, Georgia, Florida, Mississippi, Louisiana, Arkansas and Tennessee (R. 15, 16); (e) There is no averment of prices for sale, or shipment in interstate commerce; (f) The delivery of a document stating prices and terms of sale could constitute no offense without the averment that the same was made effective in restraint of interstate commerce by sales made thereunder; (g) There is no averment that appellant, or any other defendant, save Wilcox, had any knowledge of, or in any way was a party to the said act of said Wilcox.

(1) There are three particular specifications against this appellant on R. pp. 20, 28 and 34, of acts charged as having been done "in pursuance of the said unlawful conspiracy, and to effect the object of the same." The first, R. p. 20, is, that appellant, with Samuel T. Morgan and eighteen other named persons, on Sept. 17, 1903, in New York, "unlawfully did meet together to discuss and further the objects of said unlawful conspiracy, they" (meaning each party) "when and where they so aforesaid met together, each well knowing the character and purpose of said meeting, and that his said act was done in pursuance and to effect the object of said conspiracy and as act on his part of engaging in the same"; and that on page 34 where meetings of appellant and seven others, outside of Tennessee, as officers, directors and attorney of Colonial Development Company, for the purpose of discussing and attending to the affairs of said company,

is averred.

These are insufficient:

(a) For each of the reasons, (a) to (k), inclusive, supra.

(b) No **act** was averred to have been done pertaining to such conspiracy; the meeting was held **to** discuss and **to** further the objects of the conspiracy; and for the purpose of discussing and attending to the affairs of the Colonial Development, respectively, but no act is averred as having been done at the meeting, and especially, none in the execution of the alleged conspiracy. **Non constat** these meetings did or said anything, or that appellant agreed to what was done or said.

Attendance at a meeting "to discuss and further the objects of the said unlawful conspiracy"; or "for the purpose of discussing and attending to the affairs of Colonial Development Company," not even averred to have been a party to the conspiracy, would not be an engaging in a conspiracy in restraint of interstate commerce.

(c) This engaging in, if committed, was done in the State of New York, and the other states named, and appellant could not be indicted in Tennessee therefor.

(d) The said specification contains no averment of any offense.

(e) That appellant "well knew the character and purpose of said meeting, and that the meeting was in pursuance and to effect the object of the said conspiracy," cannot avail to supply the want of an averment that each had knowledge of the nature of the conspiracy, and that the meeting did some act in restraint of interstate commerce; and, especially, when the alleged conspiracy pertained to said business (intra state) trade and commerce (intra and inter state), and it is not averred as to which of these was the object of the meeting.

(f) There is no averment that appellant was ever in Tennessee.

(g) The averment is that the acts were done as officers and directors of Colonial Development Company and, hence, not the individual acts of the parties.

(h) There is no averment that the alleged conspiracy in restraint of trade was in existence at the time of the finding of the indictment.

The second specification against appellant (R. p. 28), is, that "in pursuance of said unlawful conspiracy, and to effect the object

of the same, and as an act on his part of engaging in the same," on Dec. 3rd, 1903, in the Middle District of Tennessee, appellant "as Vice-President of the said Tennessee Chemical Company" (one of the corporation defendants of which appellant is averred to be the Vice-President, and for which appellant "in their (his) several capacities as officers x x x of the said corporation defendants x x x and on behalf of these corporations x x did carry on the business aforesaid." (R. 16), "unlawfully did sign his name **with his official** designation, to-wit: 'James G. Tinsley, V. P.,' to a certain check of said date drawn by the said Tennessee Chemical Company upon the Bank of America, New York, for the payment of $6,792 to the order of the said James G. Tinsley; he x x x at the time and place, when and where, he so aforesaid signed his name to said check, well knowing the contents of the same, and that his said act was done in pursuance and to effect the object of the said conspiracy, and was an act on his part engaging in the same."

This is insufficient to charge any offense, and, especially, against appellant, because:

(a) For the reasons set forth (a) to (k), **supra.**

(b) The act averred was the act of the corporation, Tennessee Chemical Company, and not that of the appellant individually, and for which the corporation, if any one, and not both can be indicted; (c) Said act was no part of the conspiracy averred; (d) It charges no offense; (e) The averment that he "well knowing the contents of the same" (check) "and that his act was done in pursuance and to effect the object of the conspiracy, and as an act on his part of engaging in the same," does not satisfy the requirement that he, individually, with knowledge of the conspiracy and of its object, intentionally and designedly assented to and united in the said unlawful conspiracy charged by said act.

Wherefore, each of said several specifications is insufficient to charge any offense.

This count appears to have been framed upon precedents applicable to Section 5440, Rev. Stats. in that, these several specifications are treated as overt acts, and which, if done in pursuance of and to give effect to the conspiracy, would show that the overt act of that statute had been committed, and the conspiracy had been made effective, and without showing how such act would tend to effect the object, or that the object was actually effected. **U. S. v. Benson,** 70 Fed. (C. C), 591; **Baumon v. U. S.,**

156 U. S., 464. The Sherman Act has no such statutory evidential factor as the overt act. The charge that a defendant "engaged in" a conspiracy in restraint of interstate commerce must be accompanied by the averment of the facts which evidence such guilt. These acts cannot be of the colorless character of those under Section 5440, but must, as they constitute the offense itself, be accompanied with proper averments of criminal intent, and be of such nature as to show guilt on the face of the indictment.

Wherefore, this Count charges no offense against the United States by this appellant.

SECOND COUNT.

This Count Charges no Offense Against the United States.

This second count (R. 35) charges an alleged violation of Section 1 of the Sherman Act, and this second count contains, by averment or adoption, the allegations of First Count, except as follows: that "the several corporations and individual defendants and the said firms named in the first count of this indictment **in the places and in the manner and under the circumstances in that count set forth did carry on the said business, trade and commerce among the states** of the Union, within the meaning of the Act of Congress," etc. **That said corporation and individual defendants** and within the County of Davidson, in the said Middle District of Tennessee, in violation of the provisions of Section One of the said Act of Congress, **unlawfully did knowingly and wickedly conspire together and with divers other corporations and persons to the grand jurors unknown, and engage in a conspiracy among themselves,** and with such other unknown corporations, and persons, **in restraint of the said business, trade and commerce, so then being carried on by them in the manner aforesaid,** which said unlawful conspiracy in this count mentioned, then and there **was a conspiracy for restraining the said business, trade and commerce** in the several ways and by the several means now here set forth and described; that is to say."

This paragraph of the count is insufficient:

(a) The said "business, trade and commerce" are the same as in the first count, and that count shows the "said business" to be intra-state, and the said trade and commerce to be to ship intra and inter-state commerce; and hence the count affirm-

atively shows no charge of a conspiracy or of engaging in restraint of interstate commerce.

(b) The charge is not within the purview of Section One. That said corporation and individual defendants **"unlawfully did knowingly and wickedly conspire together** and with others unknown" **and engage in a conspiracy among themselves** and with such other unknown conspirators and persons, would not contravene the statute.

(a) The statute does not use the words "did conspire together."

(b) **"And engage in a conspiracy among themselves"** is an effort to charge the offense created by the words of the statute; but there is no such offense as "did conspire together and did engage in a conspiracy" defined by the statute. Under the cases, **supra,** as to the proper averments of statutory crimes, these averments are bad.

(c) That they "unlawfully did knowingly and wickedly conspire together x x x and engage in a conspiracy among themselves," is insufficient.

(d) It does not even charge the conspiracy in the language of the statute, which itself would be bad. Cases **supra.**

(e) It does not even aver that the conspiracy was corrupt. **1 Bishop, New Cr. L.,** Sec. 171, 2, 3, **supra.**

(f) Borrowing the phraseology of Section 5440, it avers that the parties "did conspire together." This was held by a majority opinion (**Wright v. U. S.,** 108 F. 803), to be sufficient under Section 5440, because **in the language of that act;** but no such language occurs in the Sherman Act. **Wilder v. U. S.,** 143 Fed., 433, 6, 7, under Section 5440, avers that it was "unlawfully, knowingly, corruptly, fraudently and feloniously combined and confederated and agreed by and between," etc., as to the proper averment for conspiracy under that Act.

(g) **"And engage in** a conspiracy among themselves" does not aver "unlawfully and knowingly" except impliedly. This averment does not in proper form, aver a violation of Section One for the reasons stated **supra** to it in considering the first count.

(h) The "said unlawful conspiracy in this count mentioned

x x x then and there, **was a conspiracy** for **restraining the said business, trade, and commerce.**" This avers the object of the conspiracy, but does not aver that this object was put into execution or effect.

The rule is that the conspiracy must be in unreasonable restraint of commerce—an actual result. An academic agreement "for restraining," if not made effective by execution, is not within the act. It is emphasized by **Peoria Gas Co. v. Peoria,** 200 U. S., 48, **supra,** where the rule of public policy was declared, **Cessante causa cessat effectus."**

(i) For restraining of "said business, trade and commerce", as shown **supra** combined the elements of intra-state and inter-state commerce, without separation, and this would be bad. It does not inform the defendant of the nature of the accusation against him.

"In the several ways and the several means now here set forth and described" this alleged conspiracy for restraining said business, trade, and commerce was evidenced. The averment follows, as in the first count, as to "competition as to the prices at which the said fertilizer was to be sold and delivered" (intra-state) "by the said corporation defendants and the said firms in the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Tennessee aforesaid, which x x x had existed between said corporation defendants and said firms respectively, in the said business, trade and commerce, and which should have continued to exist during the said period was to be prevented and destroyed the said defendants from time to time fixing and causing to be fixed uniform and non-competitive prices x x x for the said merchandise **so to be sold and delivered** x x x in the states last named, and **selling and delivering** and causing the **sale and delivery of** such merchandise in the said business, trade and commerce, at the prices so to be fixed; which uniform and non-competitive prices **were to be prices** greatly in excess of the prices which but for said unlawful conspiracy last aforesaid would at such times prevail x x x and **were to be prices** therefore unreasonable."

This is insufficient:

(a) For the reasons stated to like language in the first count, **supra:**

(b) The competition in prices was to be for sale and delivery in intra-state commerce.

(c) These prices were **to be** fixed—but there is no averment of this act ever having been done. A promissory agreement to fix prices in the future which are never fixed, cannot have effect to actually and unreasonably restrain trade or competition in prices.

(d) There is no averment that there was ever any sale and delivery at any price:

(e) There is no averment of the prices that actually prevailed; or of their increase by reason of the illegal conspiracy; prices which "prevailed" would not mean current, market prices.

(f) There is no averment of any agreement between defendants to fix; or of any joint act of fixing prices; the averment is satisfied by the several acts of each defendant for himself, irrespective of his relation to his competitors.

(g) The several acts of the several defendants set forth in the first count, as acts on their part engaging in the said conspiracy, are adopted by reference (R. 37) in this count, and none of these acts show a sale and delivery of any merchandise;

(h) No reference whatever is made in this averment to shipment in interstate commerce or of any relation to prices in respect thereto.

(i) The identical acts could not constitute engaging in the two separate, distinct conspiracies averred in the first and second counts.

The next averment in this second count is in respect to "such quantity of said merchandise as should be sold and delivered as aforesaid by any one of such corporation defendants, or of such firms, in excess of amounts to be **allotted** and **caused to be allotted** to them, respectively, by the said defendants" "the sum of $1.50 for each ton x x x was by the said corporation defendants and firms so selling the same, to be paid into a common fund, to be held by the Colonial Development Company hereinafter mentioned; from which said Colonial Development Company x x x **was to compensate** at the same rates per ton x x x such of said corporation defendants as should sell and deliver less than the amounts so allotted to them respectively." The averment as to the payment of the twenty cents per ton is as in the first count, except that it is not averred that is was paid but "was also to pay."

These averments are insufficient:

(a) For the reasons set forth to like averments in the first count **supra.**

(b) There is no averment that any allotment was made; nor that any sales and deliveries were made; nor that any payments of the $1.50 or $1.00, or twenty cents per ton were made; nor, even any agreement between defendants so to do. The whole averment is **future** and promissory, without consummation or execution; and is confined to allotments for sales and delivery in intra-state commerce.

(c) The relations of each of defendants, corporations and firms, averred to Colonial Development Company, are several and individual, and not of concert or agreement.

(d) There is no relation whatever averred between the Colonial Development Company and this appellant; nor between the individual defendants; nor that any individual was any party to the transactions with that Company.

The averment (R. 37), as to the "terms of sale", and as to the status and agency of the Colonial Development Company are the same as those of the first count (R. 19–20), except that each avers what is **to be** and not what is or was.

This is insufficient:

(a) For the reasons stated to like averments on the first count. (b) There is no averment of the execution of the things that were "to be," and, hence, no restraint of commerce, for the reasons stated **supra.**

SPECIFICATIONS OF ACTS IN SECOND COUNT.

The count then proceeds (R. 37), to aver alleged specifications, thus: **"That each and all** of the acts set forth in the first count x x x as being acts by the said **several** corporation and individual defendants in pursuance and to effect the object of the unlawful conspiracy in that count described, and as being acts on the part of said corporation and individual defendants respectively, engaging in that conspiracy, are now here in this count charged to be acts by the same corporation and individual defendants, committed at the same time and places and under the same circumstances and conditions as to knowledge and intent on the part of the said corporation and individual defend-

ants as in that count specified, but to have been committed in pursuance and to affect the unlawful conspiracy in this count of this indictment mentioned, and to have been acts on the part of said corportaion and individual defendants respectively of engaging in the last named unlawful conspiracy."

This is insufficient:

(a) The several specifications set forth in the first count are averred to have been acts done in pursuance of and to effect and as engaging in another and different conspiracy. It is impossible that the intent and the act could be the intent and an act engaging in one conspiracy and at the same time be the intent and an act engaging in another and different conspiracy. The first count purported to aver an alleged conspiracy between defendant corporations and individuals, and by acts done in restraint of trade. This count purports to aver an alleged conspiracy between different persons, viz.: Defendant corporations and individuals and other persons, and of a different character, viz: For restraining trade by proposed acts to be done in the future, and which are not averred to have been done.

(b) These specifications are of acts alleged to have been done, but none of them were acts of selling and delivering; nor at uniform and non-competitive prices. They could not, by their very nature, be acts in pursuance of, or to effect, or as engaging in a conspiracy for selling and delivering at such uniform and non-competitive prices, in the absence of any averment that the proposal to fix prices **had been executed** and **that prices had been fixed.**

(c) Every act averred is averred to have been done in Tennessee, and there is no averment that the acts were done in interstate commerce; and the acts themselves do not show acts in interstate commerce.

(d) The specifications of acts done by this appellant: (a) The meeting in New York to discuss and further the object of the said conspiracy; and (b) of signing said bank check as Vice-President of the Tennessee Chemical Company; ;and (c) of meeting in New York and other places as officers and directors of Colonial Development Company for the purpose of discussing and attending to the affairs of said company, could have no relation to the alleged conspiracy in the second count for the reasons stated **supra.**

(e) For the reasons set forth to these several specifications in considering the first count **supra.**

Wherefore, this count charges no offense against the United States by appellant.

THIRD COUNT.

THIS COUNT CHARGES NO OFFENSE AGAINST THE UNITED STATES.

It purports to charge a violation of Sec. 5440, U. S.. Rev. Stats., in that, defendants did conspire to commit an offense against the United States, viz.: The offense of engaging in a combination in restraint of said business, trade commerce.

"To conspire to conspire."

This draws in review Sec. 5440 in its relation to Section One of the Sherman Act.

The essential elements of intent and act under both statutes are the same. The overt act of Sec. 5440 would be acts done in execution of the conspiracy under the Sherman Act. Every step, from concept to execution, in the commission of the crime of a conspiracy to commit an offense against the United States by engaging in a conspiracy under the Sherman Act, and that of engaging in a conspiracy under the Sherman Act would be common. The same averments of fact as constituting the conspiracy are made, and the identical evidence, **uno flatu,** would prove both. Hence, there would be a merger.

This count and the sixth count, under Sec. 5440, could not be joined with the first, second, fourth and fifth counts charging the offense itself of engaging in a conspiracy in restraint of trade, because,

(a) To indict appellant for the offense itself of engaging in a conspiracy in restraint of trade, under Counts 1, 2, 4, and 5, under the Sherman Act, and under Section 5440, for conspiring to engage in a conspiracy under the Sherman Act, would be to violate the Fifth Amendment to the Federal Constitution; in that, it would subject appellant for the same offense to be twice put in jeopardy of life or limb.

In **U. S. v. Gardner,** 42 Fed. 831, on the question of merger, it is said: "The reason why a conviction cannot be had for the conspiracy to commit a felony, or for an attempt to

commit a felony, when it appears that the felony was actually committed, is that an acquittal for the minor offense would not bar a subsequent indictment for the major, and consequently the accused might be put twice in jeopardy for acts which were all constituent parts of one offense. On the other hand, a conspiracy to commit an offense of the same grade does not merge in the consummated offense, and upon an indictment for the offense which was the object of the conspiracy, the accused can plead a conviction or acquittal upon the indictment for the conspiracy, and the plea would be a good bar."

In **State v. Setter,** 14 Am. St. Rep. 125, it was said:

"The principles upon which the doctrine of merger rests are, that the offense merged is lesser than the one in which it is merged, and that the ingredients of the smaller one are so identical with the ingredients of the larger that when both have been committed, they cannot in reason and justice be separated; so that to punish an accused in such a case for both offenses would be in effect to punish the same act twice."

"It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so where the crime is of a higher grade and the object of the conspiracy is fully accomplished." **People v. Mather,** 4 Wend., 265, 21 Am. Dec., 122.

"If, therefore, on the trial of a misdemeanor, it appears that the same acts involve a felony, the proceedings will be arrested; otherwise the conviction and judgment on the lesser offense may be pleaded in bar of a prosecution for a higher crime." **Johnson v. State,** 29 N. J. L., 312, 324.

In **Cline v. U. S.,** 159 U. S. 596, it was held, that under Sec. 5440 an indictment would lie for conspiring to obstruct the mails—a different offense from conspiring—even though followed by a more severe penalty than the crime of obstructing itself; but the Court expressly pretermitted deciding whether the commission of the offense merged the conspiracy to commit it.

In none of the cases found by us is there any support for this joinder. There are a number of Federal cases holding that, even though Sec. 5440 is held to create an infamous crime, it is proper to indict for a conspiracy to commit an offense against the United States; but none in our research holding that where the offense itself has been committed, that the conspiracy to

commit and the offense itself can both be punished and both be joined in one indictment. The latest case on this proposition is **U. S. v. New York Cen. R. Co.,** 146 Fed., 298, and it holds that an indictment would not lie for **both** the conspiracy and the offense.

The test of being put twice in jeopardy is stated in **Sutherland's Notes on U. S. Const.,** 635, citing **Berkovitch v. U. S.,** 83 Fed., 452, and other cases, to be: "Unless the first indictment were such as the prisoner might have been convicted upon the proof of the facts contained in the second indictment an acquittal on the first indictment can be no bar to the second." Nor can an offense be split up into several parts. **Id.** 637.

The identical facts are averred, and would be in evidence to support each of these counts, and to punish under each would be to subject appellant to be punished twice for the same acts as constituting both offenses.

(b) If the legal judgment on each count would be materially different, as in felony and misdemeanor, then the joinder of such counts would be bad, in error, or in arrest, **1 Whar. Am. Cr. L.,** Sec. 418. Sec. 5440 creates an infamous crime. **Mackin v. U. S.,** 117 U. S. 348. **In Wilder v. U. S.,** 143 Fed., 433, the indictment under Sec. 5440 charged the act to have been **feloniously done.** The Sherman Act creates a misdemeanor.

(c) If the agreement to do the act, with a colorless overt act, constitutes the elements of the offense under Sec. 5440, and the Sherman Act requires unreasonable restraint of commerce, the scope of the criminal elements of each is such that they are legally incompatable.

(d) If Section 5440 applies, then the Sherman Act was unnecessary in its criminal conspiracy features.

The averment of the gist of the offense is (R. 36) that defendants "unlawfully did knowingly and wickedly conspire together x x x to commit an offense," etc.

This is insufficient:

(a) It does not aver that the conspiracy was corrupt.

(b) Nor that it was done feloniously. **Mackin v. U. S.,** 117 U. S. 348; **Wilder v. U. S.,** 143 Fed. 433; **Wright v. U. S.,** 108 Fed. 813; Pardee, J. dissenting.

(c) The "said business, trade and commerce" were, as in the first count, intra-state as to business and intra and inter-state as to shipment.

The "several ways" and "means" by which this conspiracy was created are those averred in the second count, and thereby "competition as to prices at which the said merchandise **was to be sold and delivered"** x x x **"was to be** prevented and destroyed by the said defendants from time to time fixing and causing **to be** fixed uniform and non-competitive prices x x x for the said merchandise so **to be** sold x x x and at the prices **so to be fixed** and caused **to be fixed** x x x which were to be prices greatly in excess x x x and **were to be prices** therefore unreasonable."

This is insufficient:

(a) For the reasons set forth, **supra,** to like language in counts one and two.

(b) There is no averment that the prices that **were to be fixed were ever fixed;** and, hence, there could not have been an actual unreasonable restraint of commerce.

(c) The competition in sale and delivery was "in the states" —(R. 38) intra-state commerce. The prices were to be fixed for sales and deliveries in "said business, trade and commerce" and these were to be only in intra-state commerce.

The averments as to allotments and of the relations to the Colonial Development Company, and of the terms of sale, are the same as in the second count, and the same objections as there would obtain.

The count adopts the specific acts set forth in the first count (R. pp. 20–35), as being acts of the several defendants done "in pursuance of and to effect the object of the unlawful conspiracy in this count."

This is insufficient:

(a) For the reasons set forth to like language in counts one and two, **supra.**

(b) The same acts and the same intents could not have been done and had to effect these three separate, distinct conspiracies, two of which were misdemeanors, the other a felony. Such allegations are contradictory and on their face untrue.

(c) The overt act of the statute must be an act giving effect to the conspiracy, and every one of these specific acts bears no relation to the sale and delivery of fertilizers, at uniform non-competitive prices, in interstate commerce; or to competition therein. The averment that the were done in pursuance and to effect the object of the conspiracy is irreconcileable with the act itself which is averred, and which, on its face, shows that it was not an act done in interstate commerce. Where the specific act is not set forth, the general averment, under Sec. 5440, of the act being done in pursuance and to effect the object of the conspiracy, has been found unobjectionable, but where, as here, the act itself is set forth, and that act shows that it could not be an act in violation of the Sherman Act, then the specific averments must control.

For these reasons the Third and Sixth Counts are bad.

FOURTH COUNT.

After an effort to formulate the charge of an offense under the Sherman Act by counts one and two, and under Section 5440 by count three, the pleader catches "new wind", and proceeds to "try, try again," by rehashing the same elements in counts four, five and six. **Cui bono?**

The fourth count (R. p. 93) charges no offense:

(a) It recites that the "several corporations named as defendants in the first count were separate and distinct corporations, severally organized and existing under and authorized by the laws of the several states and of the foreign country therein named: that the several individuals named as defendants were "severally officers, managers, agents, and attorneys of the said corporation defendants, and members of the firms therein named in the said first count in connection with each of them respectively; that the said corporation defendants and the firms during said period carried on business in the states of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Tennessee, hereinafter called the states of the conspiracy, in their own names, and under and through the said corporate and trade names and through the other corporations named in the first count, x x x as wholesale dealers in articles of fertilizer merchandise in the manner and to the extent set forth in the said first count, and in so carrying on said **business, sold and furnished** large quantities of fertilizer merchandise **to**

merchants and consumers **located in the said states of the conspiracy** and **shipped** the same from their respective places of business located at different points in the said states of the conspiracy and the states of Virginia, Illinois and Kentucky, and **delivered** the same **at various points in said states of the conspiracy**; that in so carrying on said **business** said corporation defendants, subsidiary companies and firms **severally shipped** said merchandise **to** and **delivered the same at** such various points of delivery **by shipments and deliveries wholly within one and the same state, by shipments** from points in one state to and deliveries at points in another state, and by shipments and deliveries between points in the same state, but by way of and partly through another state, and **were severally engaged both in local commerce in such fertilizer merchandise, as aforesaid, and also in commerce in such fertilizer merchandise among the** several states of the United States, to-wit, among the said several states of the conspiracy and the said states of Virginia, Illinois and Kentucky, within the meaning of the Act of Congress, approved July 2nd, 1890."

This is insufficient:

(a) It does not charge sales and deliveries of fertilizer in interstate commerce. Sales and deliveries at uniform and non-competitive prices being the gravamen of the subsequent charge of the count.

(b) It avers that defendants as wholesale dealers "sold and furnished x x x such fertilizers x x x to merchants and consumers located in the said states of the conspiracy." (a) This avers that the fertilizer was sold and furnished intra-state; (b) "furnished" does not mean a sale; it is a more comprehensive term and does not necessarily mean a sale. It does not mean a sale here because "sold and furnished" would express two distinct ideas. **So. Ex. Co. v. State,** 33 S. E., 638; **State v. Freeman,** 27 Vt., 520; **Enlow v. Keef,** 79 Pa. St., 490.

(c) The averment "and shipped the same from their respective places of business located at different points in the states of the conspiracy, and the states of Virginia, Illinois and Kentucky, and delivered the same at said points of said states of the conspiracy," does not aver that the identical goods **sold** were **shipped**. The goods "furnished" may be those shipped, and not those sold. The averment "and delivered the same at various points in the States of the conspiracy" does not mean a delivery in inter-state commerce; nor do all of the foregoing quotations

show that the sales and deliveries were in inter-state commerce. "That in so carrying on said business said corporation defendants, subsidiary companies and firms severally shipped said merchandise to and delivered the same at such various points of delivery by shipments and deliveries wholly within one and the same state, by shipments from points in one state to and deliveries at points in another state, and by shipments and deliveries between points in the same states, but by way of and partly through another state," does not aver that the merchandise sold was shipped and delivered in interstate commerce. This averment of "shipments" and "deliveries" would imply "shipments" of goods "furnished"; "deliveries" of goods "sold." No inter-state sale and delivery is averred by this language. This is conclusively evidenced by the subsequent averments of the specific acts whereby the parties named engaged in the conspiracy (R. p. 44-7); all of which are in intra-state commerce.

The count further avers (R. p. 41): "that the said individual defendants x x x in their respective capacities as officers, managers, agents and attorneys of the said corporation defendants and members of said firms x x were engaged in carrying on the said aforesaid business, and the aforesaid local and interstate commerce for and on behalf of said corporations and firms, respectively."

This is insufficient:

(a) It charges the acts done to have been in a representative capacity; and, hence, appellant would not be individually liable to indictment therefor.

The count charges (R. p. 41) that "prior to the period aforesaid the said business **and** commerce had been carried on independently as between said corporation defendants and firms and in competition each with the other," and that it would have been so carried on but for the unlawful conspiracy next and in this indictment mentioned.

It will be noted that "said business **and** commerce" is the "business and commerce" in the first count mentioned, namely, intra-state business of sale and delivery, and intra and inter state commerce by shipments. The count then charges (R. p. 41) that at "the County of Davidson in the said Middle District of Tennessee in violation of the provisions of said section one x x x the said corporation defendants named in the

said first count" (reciting them) "and the said individual defendants named in the first count" (reciting them) "unlawfully did knowingly and wickedly engage in a conspiracy in restraint of commerce among the several states, to-wit, a conspiracy in restraint of the aforesaid commerce in such fertilizer merchandise among the several states aforesaid, whereby the said commerce was restrained by the several means and in the several ways following, that is to say";

This is insufficient:

(a) For the reasons stated to like language in the first count, **supra**; (b) "In restraint of the aforesaid commerce" signifies the merchandise "furnished" as shown, **supra**; (c) The sales were in the "business".

The conspiracy here averred, followed by the averment that it was restrained by the several means and in the several ways following, is controlled by subsequent averments. **Sullivan v. State,** 67 Miss., 346, 353, 354, 355, and cases supra.

The count then avers (R. p. 42) that the conspiracy in restraint of the aforesaid commerce was restrained "by the said defendants from time to time fixing and causing to be fixed a schedule of uniform and non-competitive prices upon the said fertilizer merchandise which were maintained and adhered to by the said corporation defendants, subsidiary companies and firms in carrying on the aforesaid business and local and interstate commerce, in making sales and deliveries in said fertilizer merchandise to merchants and agents buying and selling again at a profit and consumers at the various points of delivery in the said states of the conspiracy, which were prices greatly in excess of those that had prevailed in the said states of the conspiracy prior to the period of such unlawful conspiracy, and greatly in excess of those prices which would have otherwise prevailed in the said states during the periods of said unlawful conspiracy and were therefore unreasonable." (R. p. 42).

This is insufficient:

(a) It does not aver that the alleged uniform and non-competitive prices were fixed or caused to be fixed by any agreement, corrupt or otherwise, between defendants. (b) For the reasons set forth, **supra,** to the same language in Count one, **supra**; (c) It is not averred that such prices were maintained and adhered to by any agreement, corrupt or otherwise; (d) Uniform and non-competitive prices are not applicable to "sales and deliveries"

of fertilizer under the allegation that it was "sold and furnished"; (e) That the prices were maintained and adhered to by the defendants in carrying on the "aforesaid business" and local and inter-state commerce" comprehends by the use of the word "business," in addition to the "local and interstate commerce" averred **supra** an element undefined in the count; (f) The general averment that defendants maintained uniform and non-competitive prices in making sales and deliveries in the said states of the conspiracy in carrying on the aforesaid business and local and interstate commerce, does not show that there were any sales and deliveries in inter-state commerce at such prices; (g) The averment that the prices were greatly in excess of those that **had prevailed** prior to the period of such unlawful conspiracy is too indefinite. Whether one or ten years before; "prevailed" may mean merely at times. "Prevailed" does not signify current market prices.

The averment that they were greatly in excess of those that would have prevailed are conclusions of the pleader and not facts. The averment that they were "therefore unreasonable" is a conclusion.

The count then avers, as a ways and means of restraining commerce, "by the said defendants using and causing to be used the following plan and scheme in order to secure adherence to said uniform and non-competitive prices, whereby earnest money was given to secure maintenance of such prices, and compensation was to be made to those losing volume of business by reason of maintaining such prices; that is to say."

This is insufficient:

(a) It does not aver that there was any agreement, corrupt or otherwise, between defendants; (b) It does not aver that any earnest money, **inter se**, was given. As recited subsequently (R. p. 43) it appears that the alleged "earnest money" was paid to the Colonial Development Company "by each of defendant corporations and firms which faithfully maintained such uniform and non-competitive prices and failed to make sales and deliveries of such merchandise through itself and its subsidiary companies in the said states of the conspiracy in a percentage amount corresponding to its aforesaid tonnage allotment, but sold and delivered through itself and subsidiary companies a minimum amount thereof required as a guarantee of good faith, received from such common fund, as compensation on account of such short sales,

the sum of one and one-half dollars per ton on ammoniated fertilizers and one dollar per ton on other fertilizers, divided in the same ratio as in its total sales, upon the amount by which its sales and deliveries made as aforesaid fell short of the percentage amount of its allotment, as aforesaid; and on the other hand, each of said corporation defendants and firms which x x made such sales and deliveries x x x in excess of its allotted percentage amount as aforesaid, as a penalty upon such excess sales, paid into such common fund like amounts per ton on the said respective kinds of fertilizers, divided in like ratio, upon the amount of such excess sales aforesaid";

"By using and causing to be used as a chief means whereby said unlawful conspiracy was effected, a corporation of Ontario, Canada, whose stock was apportioned among the said corporation defendants and firms and paid for by them at ten dollars a share; whose treasury was the common fund aforesaid into which was paid the earnest money and penalties on excess sales aforesaid, and from which was paid the compensation on account of short sales aforesaid; and which said Colonial Development Company, Limited, was used as a general intermediary and common agent of the said defendants in carrying out said unlawful conspiracy and the chief instrumentality, mechanism and device by and through which the same was operated and directed."

This shows: (a) That there was **no agreement** between defendants as to the alleged allotment and payments; but that the same was made by and to the Colonial Development Company, a corporation lawfully organized; and not averred to have been in any way a party to the alleged unlawful conspiracy; (b) The allotment and payment were made in respect **to sales and deliveries** only, and these were intra-state commerce. There is is no averment that there was any allotment of inter-state commerce; nor any payment to the Colonial Development Company in respect thereto. There is no averment of any payment in respect to any shipment of fertilizers. The averment, is, that **each** of the defendants made these payments to the Colonial Development Company; and that the Colonial Development Company imposed the penalty on the excess sales; but these sales are not averred to have been in inter-state commerce.

It is not averred that the Colonial Development Company was **by agreement,** corrupt or otherwise, by the defendants used as an intermediary or common agent. The Colonial Development Company is averred to be a corporation of Ontario, Canada,

and these transactions are not averred to have been in the State of Tennessee; nor even in the United States. It is not averred that the alleged conspiracy was existent at the time of the finding of the indictments.

Treating these allegations as a sufficient averment of the conspiracy, the count proceeds to aver the specific acts of **some** of the defendants by which each engaged in it. It avers specific acts, viz.: that "the corporation defendants and individual defendants hereinafter named in pursuance of said unlawful conspiracy in this count mentioned and to effect the object of the same, do and perform the acts hereinafter set forth in connection with each of them respectively x x and did do and perform such acts on their respective parts of engaging in the said unlawful conspiracy in this count of this indictment mentioned; and that each of such defendants at the time and place when and where such defendant did and performed the acts hereinafter so set forth in connection with such defendant respectively, then and there well knew the character of such act and that such act was done in pursuance of and to effect the object of said unlawful conspiracy in this count mentioned, and as an act on the part of such defendant in engaging in the same, that is to say."

This is insufficient:

It avers the then existent conspiracy, and that the acts done were acts engaging in the same; (a) For the reasons stated, **supra,** to count one; (b) It does not aver that defendant had knowledge of its character, and did knowingly and designedly assent to and unite in the unlawful conspiracy charged by doing the said acts. **U. S. v. Goldberg,** 7 Biss., 175; **6 Am. & Eng. Enc. L.,** 2nd Ed., 840; (c) There is no averment of any corrupt agreement; (d) These averments are controlled by the specifications following, and these show no act done, or averred even to have been done, in interstate commerce.

The count then proceeds to enumerate twenty separate, independent acts of **some** of the defendants, **severally.** None of them save one (R. p. 45-6) being any act averred to have been done by this appellant; and each of said acts is averred to have been done in Tennessee. The act alleged to have been done by appellant is that of signing a check as Vice-President of Tennessee Chemical Company set forth in the first count, and insufficient for the reasons set forth **supra** to that specification in the first count.

None of said specifications (R. p. 44-47) are averred to have been a sale and delivery of fertilizer at uniform, non-competitive prices, or otherwise; nor of the shipment or furnishing of the same in interstate commerce. None of said specifications are sufficient, in themselves, to charge, in proper form, the offense of engaging in the conspiracy by the person or corporation charged.

The first four of said specifications (R. p. 44) charge that the Virginia-Carolina Chemical Company did the several acts in pursuance of said unlawful conspiracy and to effect the object of the same, and the first and third averring (through an agent whose authority is not averred) that said defendant, at Decherd, in the Middle District of Tennessee: (1) "unlawfully did knowing offer and agree to furnish and deliver to one J. L. Haynes, Jr., at Decherd, as aforesaid, sixty-five tons of the fertilizer merchandise aforesaid;" (2) That it "unlawfully did knowingly cause to be delivered to the said J. L. Haynes, Jr., at Decherd, as aforesaid, in the said Middle District of Tennessee, fifteen tons of such fertilizer merchandise"; (3) That it did at Decherd by its agent, Watkins, "unlawfully did knowingly offer to furnish to the said Haynes seventy-five tons," etc.; (4) That it "unlawfully did knowingly cause to be delivered to the said J. L. Haynes, at Decherd, aforesaid, x x x fifteen tons," etc.

These are insufficient:

(a) Each of these averments show a transaction in intrastate commerce; and could not support the charge of conspiracy, or of engaging in a conspiracy by the Virginia-Carolina Chemical Company, much less by appellant, in restraint of interstate commerce; (b) By apt words it does not charge the constituents of the offense under Section one. (c) It does not aver a sale and delivery at uniform non-competitive prices, by agreement, in interstate commerce, or otherwise.

The next three specifications (R. p. 44-45) charge that Armour & Company in pursuance of said unlawful conspiracy and to effect the object of the same, within Nashville, Tennessee, by one Alexander Leslie, its agent, "unlawfully, did knowingly deposit in the postoffice of the said United States, there, addressed, and to be sent and delivered by mail to the Bramlitt Hardware Company, at Corinth, in the State of Mississippi, that certain notice of shipment, partly written and partly printed, set forth and specified in the first count of this indictment," etc.

This is insufficient: (a) It does not show any authority in the agent; (b) It does not show a sale or delivery, at uniform, non-competitive prices in interstate commerce; (c) It does not show where the sale of the fertilizer was made. The notice (R.

p. 22) shows that it recites a shipment from Nashville, Tennessee, storage. It does not show that any fertilizers were either shipped in interstate commerce or otherwise.

The second specification against Armour & Company (R. p. 44) avers that at West Nashville, Tennessee, it "unlawfully did knowingly **deliver** to the Louisville & Nashville Railroad Company **for shipment** by rail to Corinth in the state of Mississippi, consigned to said Bramlitt Hardware Company in that state twenty tons," etc.

This is insufficient: (a) It avers a delivery "for shipment" and not the shipment itself; (b) It does not show that the fertilizer was delivered under any sale in inter-state commerce; nor at uniform and non-competitive prices; (c) It does not charge any offense under section one.

The third charge is that Armour & Company within West Nashville, "unlawfully did knowingly deliver to the Nashville, Chattanooga and St. Louis Railway, fifteen tons of the fertilizer merchandise aforesaid consigned and to be shipped to one J. B. Duncan, at Jonesboro, in the State of Tennessee."

This is insufficient: (a) It is the averment of a delivery for shipment in intra-state commerce; (b) "Consigned "and to be "shipped" does not aver a shipment; nor at uniform, non-competitive prices; nor in interstate commerce.

The next two specifications (R. p. 45) charge that the Federal Chemical Company, in pursuance of said unlawful conspiracy, and to effect the object of the same, (1) at West Nashville "unlawfully did knowingly **deliver to** the Louisville & Nashville Railroad Company fifteen tons of the fertilizer merchandise aforesaid, consigned **and to be shipped** to one J. F. Walker, at Athens, in the State of Alabama," etc.

This is insufficient: (a) It does not aver a sale and delivery at uniform, non-competitive prices; (b) nor does it aver a shipment in interstate commerce, but only that the defendant **delivered** to the Railroad Company "consigned and **to be** shipped." **Non constat** the defendant was the shipper; or consignor; or that the merchandise was ever shipped. A mere delivery to a railroad "to be shipped" would not constitute a shipment in inter-state commerce.

The second specification charges that at West Nashville said Federal Chemical Company "unlawfully did knowingly **deliver** to the Nashville, Chattanooga & St. Louis Railway twenty tons

of the fertilizer merchandise aforesaid, **consigned and to be shipped** to the firm of Hendricks Brothers & McGovack, at Athens, in the State of Alabama," etc.

This is insufficient: (a) It does not aver any offense, for the reasons stated to the last specification.

The next three specifications (R. p. 45) are that the Furman Farm Improvement Company in pursuance of said unlawful conspiracy, and to effect the object of the same: (1) At Springfield, Tennessee, "unlawfully did knowingly **offer to furnish** x x x one hundred and forty tons," etc.

This is insufficient: (a) It is intra-state commerce; (b) It does not aver the offer at uniform, non-competitive prices or any other price; (c) It shows no sale or shipment in interstate commerce

(2) That it "unlawfully did knowingly **deliver** to the Nashville, Chattanooga & St. Louis Railway, fifteen tons, x x x **consigned and for shipment** through the said states of Alabama and Georgia to the said firm of Fiser, Orndorff & Williams, at Springfield, aforesaid, in the State and Middle District of Tennessee," etc.

This is insufficient: (a) It does not aver a sale and delivery at non-competitive prices, nor in interstate commerce; (b) It does not aver a shipment by defendant but only that it was delivered and consigned "for shipment"; **non constat** the defendant was the shipper, or that the merchandise was ever shipped;

(3) That defendant at Springfield, "unlawfully did knowingly cause to be delivered to the said firm x x x fifteen tons."

This is insufficient: (a) It does not show a sale and delivery at uniform, non-competitive prices; (b) nor in interstate commerce but in intra-state commerce.

The next specification (R. 45-6) is that appellant in pursuance of said unlawful conspiracy and to effect the object of the same within the County of Davidson, Tennessee, as Vice-President, of the Tennessee Chemical Company, unlawfully did sign his name with his official designation, "James G. Tinsley, V.-P.," to a certain check bearing said date drawn by said Tennessee Chemical Company upon the Bank of America, New York, for the payment of six thousand, seven hundred and ninety-two dollars to the order of the said James G. Tinsley, etc.

This is insufficient: (a) It shows that the act done was as an officer of the Tennessee Chemical Company, joined as defendant

in this count; (b) said act was not a sale and delivery of fertilizers; (c) It is not averred what relation it had to the alleged conspiracy; (d) Nor how it could be an act on the part either of said Tennessee Chemical Company or of appellant in engaging in said conspiracy; (e) The act averred is intra state, and no connection with inter state commerce is averred; (f) And for further reasons set forth, **supra,** to a like specification under the first count (R. p. 28).

The next specification (R. p. 46) is against the National Fertilizer Company: (1) that within Davidson County, Tennessee, it "unlawfully, did knowingly **deliver** to the Louisville & Nashville Railroad Company, **for shipment** by rail to Cullman, in the said State of Alabama, **consigned** to one T. B. Williams at that place, twenty tons of fertilizer merchandise," etc.

This is insufficient:

(a) To show a sale and delivery at uniform and non-competitive prices in interstate commerce; (b) or a shipment in inter state commerce; to "deliver" "for shipment" by rail to the railroad company is no averment of a shipment by the defendant for the reasons stated **supra.**

The next two specifications (R. p. 46) charge that William D. Rhea in pursuance of said unlawful conspiracy and to effect the object of the same: (1) within Davidson County, Tennessee, "unlawfully did direct and require E. W. Connell, treasurer of the said National Fertilizer Company to sign his, the said E. W. Connell's name as such treasurer to a certain check dated that day and drawn by the said National Fertilizer Company upon the American National Bank of Nashville, aforesaid, for the payment of the sum of four hundred and eighty dollars to the order of F. Burbidge," etc.

This is insufficient:

(a) It does not charge a sale or shipment or delivery of fertilizer; (b) It does not show any relation to the conspiracy charged, nor how it could be the engaging therein; (c) It shows an intra-state transaction; (d) It was the act of the corporation for which Rhea was acting;

(2) That said Rhea within the County of Davidson, Tennessee, "unlawfully did sign his name, to-wit: 'Wm. D. Rhea,' after the word 'approved' and above the word 'manager,' upon the face of a certain printed document too voluminous to be here

set forth in full, whereby and wherein the said National Fertilizer Company offered to sell and deliver to one James A. Boyd, at Jonesboro, in the said State of Tennessee, fifty tons of fertilizer merchandise aforesaid," etc.

This is insufficient:

(a) This does not show any connection with inter-state commerce; (b) Nor a sale and delivery at uniform prices in interstate commerce, but is expressly intra-state commerce; (c) Said act averred would not be the act of William D. Rhea, but of the National Fertilizer Company.

The next two specifications (R. p. 46-7) charge that Abram C. Read (1) within the County of Davidson, Tennessee, "unlawfully did sign his name, to-wit: 'A. C. Read,' after the word 'approved' and above the word 'Manager' upon the face of a certain document, partly printed and partly written, too voluminous to be herein set forth in full, whereby and wherein the said Read Phosphate Company offered to furnish and deliver at Hartselle, in the State of Alabama, to one S. E. Stewart, forty to sixty tons of the fertilizer merchandise aforesaid," etc.

This is insufficient:

(a) The act was official; (b) It does not aver a sale and delivery at uniform and non-competitive prices, but an offer to furnish and deliver; (c) It does not aver that any act in consummation was done; (d) The act of offering was intra-state, and not an act in restraint of interstate commerce.

The second specification (R. p. 47) is that said Read "within the County of Davidson, in the said Middle District of Tennessee," "unlawfully did sign his name, to-wit: 'A. C. Read,' after the words 'Approved, Nashville, Tenn., Dec. 6, 1904,' and above the word, 'Manager,' upon the face of a certain other printed document x x x wherein and whereby the said Read Phosphate Company and the said Abram C. Read as Manager thereof offered to sell to the said S. E. Stewart and to deliver to him at Hartselle, in the State of Alabama, forty to fifty tons of the fertilizer merchandise aforesaid," etc.

This is insufficient:

(a) To charge said Read, the act being official; (b) It does not show a sale or delivery at uniform and non-competitive prices;

(c) It does not show a sale in Tennessee in inter-state commerce; (d) It is a mere offer to sell without declaration as to the place where the sale was to be made, nor from whence the goods were to be delivered.

The next specification (R. p. 47) is that the Tennessee Chemical Company at Nashville "unlawfully did knowingly **deliver** to the Louisville & Nashville Railroad Company twenty tons of the fertilizer merchandise aforesaid, **consigned and to be shipped** to the firm of D. P. Haynes & Brother, at Chaccalacca, in the State of Alabama," etc.

This is insufficient, for the reasons stated, **supra,** to the like charge against the Federal Chemical Company.

The next specification (R. p. 47) is that T. Garland Tinsley, at Nashville, Tennessee, "unlawfully did cause to be written and sent by mail to 'D. P. Haynes and Bro.,' at Oxford, Alabama, that certain letter of the date set forth and specified in the first count of this indictment," etc.

This is insufficient:

(a) It does not charge an individual, but an official act; (b) The writing of said letter does not show any act in inter-state commerce, nor that the subject matter even pertained to fertilizers; (c) It shows an intra-state transaction; (d) It does not show any sale or delivery, at uniform, non-competitive prices; nor any shipment of fertilizer in inter state commerce.

The next specification (R. p. 47) against T. Garland Tinsley is that at Nashville, he "as attorney of the said James G.Tinsley, unlawfully did write an endorsement, to-wit: 'Pay to order of Colonial Development Co.,' on to-wit, a check of the same date drawn by the said Tennessee Chemical Company upon the Mercantile National Bank, New York, for the payment of sixteen hundred and twenty-five dollars and eight cents to the order of the said James G. Tinsley," etc.

This is insufficient:

(a) It does not show any act of T. Garland Tinsley, but purports to be his act as attorney; (b) Said act shows no connection with the alleged conspiracy; (c) There is no averment of any knowledge of the object of the conspiracy; (d) No connection is shown between said act and the alleged conspiracy to restrain competition in prices in sales and deliveries of fertilizers in inter-

state commerce.

These several specifications charging the several, separate acts of a part of these defendants are insufficient in themselves as charging an offense against the person or corporation specified, and especially as against the other defendants. As specifications, each paragraph must, as if a separate count in the indictment, be sufficient, in itself to charge the offense, and in this it wholly fails.

The general averment of the alleged conspiracy in averring that the defendants were engaged in local and interstate commerce in fertilizer in restraint of "said business, trade and commerce" when coupled with the above specifications of the acts done shows that it was wholly intra state commerce, and that this alleged conspiracy did not pertain to interstate commerce. The specific acts alleged as creating this crime against interstate commerce, clearly show that they were intrastate, and had no relation to interstate commerce; nor to sales and deliveries; nor to furnishing; nor to shipments of fertilizers at uniform, non-competitive prices therein.

FIFTH COUNT.

The fifth count is substantially the fourth count, the only change being that the alleged conspiracy was between the defendants named **and divers other corporations and persons to the grand jurors unknown,** and it recites the same specific acts as in the fourth count in support of this alleged conspiracy.

SIXTH COUNT.

This sixth count is substantially the third count, charging the violation of Section 5440, Rev. Stats., except that in the averment of the carrying on said business charged and set forth as recited in the first count and adopted in the third count, it avers that as wholesale dealers of fertilizer merchandise in so carrying on said business "they sold and furnished large quantities," etc., instead of selling and delivering.

The same acts, in the same language charged in the fourth count, are iterated in the sixth count as being acts done in pursuance of and to effect the object of the conspiracy under Sec. 5440, and to have been done in pursuance of and to effect the object of and as an act engaging in a conspiracy under Sec. 1 of the Sherman Act.

For the reasons set forth, **supra**, to the third count, and to the fourth count, and, which, to avoid prolixity, are not iterated, this count is bad.

For these reasons and those set forth in the briefs of associate counsel the judgment should be reversed and the appellant should be discharged.

Respectfully,

MARCELLUS GREEN,

GARNER WYNN GREEN,

OF COUNSEL FOR APPELLANT